

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01:
WHISTLING RIDGE ENERGY LLC;
WHISTLING RIDGE ENERGY PROJECT

SKAMANIA COUNTY AND
KLICKITAT COUNTY PUBLIC
ECONOMIC DEVELOPMENT
AUTHORITY'S RESPONSE TO (1)
OBJECTION OF FRIENDS OF THE
COLUMBIA GORGE, INC. AND SAVE
OUR SCENIC AREA; AND (2)
PETITIONS FOR RECONSIDERATION

ORAL ARGUMENT OPPOSED

TABLE OF CONTENTS

1. INTRODUCTION.....	2
2. ARGUMENT: RESPONSE TO OBJECTION.....	3
2.1 Skamania County is Located Within Washington State.....	3
2.2 Skamania County is Located Within the United States	5
2.3 Chemawa Hill is Located Within Skamania County.....	6
3. ARGUMENT: RECONSIDERATION PETITIONS.....	7
3.1 Skamania County Certified Land Use Consistency.....	7
3.2 EFSEC Correctly Interpreted Hearing Examiner Decision...	7
3.3 County Zoning Authorizes the Project.....	8
3.4 Comprehensive Plan Consistency is not Required.....	10
3.5 The Moratorium Does not Apply.....	11
3.6 The County Opposes Further Oral Argument.....	12
3.7 Extra-Record Documents Should be Stricken	12
3.8 Seattle Audubon Petition is Without Basis.....	12
4. CONCLUSION.....	13

1
2 **1. INTRODUCTION**

3 Skamania County and Klickitat County Public Economic Development Authority
4 ("Skamania County"), in their reconsideration petition, requested that EFSEC recommend
5 approval of the Whistling Ridge Wind Energy Project as proposed, with all 50-turbines. The
6 County requested this because County zoning authorizes the Project (it is the only one proposed
7 for location in Skamania), and it is critical for the County's economic future.
8

9 Skamania County does recognize EFSEC has put enormous effort into Project review and
10 has exhaustively reviewed the issues put before it. In many respects, the County supports the
11 Recommendation. In particular, EFSEC has correctly interpreted the County zoning and
12 comprehensive plan. And, the County recognizes it is EFSEC's role to mitigate Project impacts,
13 which it has done, consistent with applicable laws, except for the approach taken with respect to
14 the two turbine strings removed from the Project. The challenge for the County is addressing the
15 prospect of losing an economic development project which is so critical to its future. It is
16 particularly difficult when the basis for turbine removal is the Scenic Area, which the Project is
17 outside of.
18

19 Friends and SOSA oppose the entire Project. Other than complete denial, there is no
20 EFSEC Recommendation which would satisfy the Opponents. To that end, they submit 81
21 pages of reconsideration briefing; documents from outside the Record which the County requests
22 EFSEC strike; and an objection to the County's appointed Council representative. Given the
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County's limited resources, and out of respect for EFSEC's time, Skamania County submits a combined response to these issues, focusing narrowly on the issues of greatest concern.¹

2. ARGUMENT: RESPONSE TO OBJECTION

Skamania County is the host County for the Project. This is not a project located in multiple counties or otherwise crossing jurisdictional boundary lines. As the sole host county, Skamania is affected by all issues EFSEC considered in its Recommendation.

EFSEC rules address the situation where there are multiple local jurisdictions involved in the siting process, raising the potential for issues which may be unique to a jurisdiction. Under EFSEC's rule addressing "[p]articipation by county, city and port district representatives," council members representing a local jurisdiction address only the issues affecting their jurisdictions.² Here; however, there is only one host county. No other city, county, or port district has appointed a council representative. Consequently, there are no issues applicable to one jurisdiction but not to another. Further, Friends and SOSA fail to meet their burden to demonstrate a basis for their objection with their three conclusory examples.

2.1 Skamania County is Located within Washington State

Skamania County is a county incorporated within the State of Washington. Skamania's citizens elect representatives to serve them in the State Legislature and the County must follow State laws. Skamania County is affected by the laws enacted by the State Legislature, and how they are interpreted. Thus, the "interests of the State as expressed in RCW 80.50.010," affect Skamania County. And, a county is particularly and uniquely affected when a State law is being used to site an energy facility within that county.

Yet, Friends and SOSA, without citation to the actual language in RCW 80.50.010, which addresses an array of topics, assert: "[o]bviously this [statute] does not affect Skamania

¹ Skamania County refers EFSEC to the applicant's briefing, which provides further analysis.

² WAC 463-30-093.

County.”³ It is difficult to understand how RCW 80.50.010, cited in full below, does not affect Skamania County.

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises:

(1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at reasonable cost.

(4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.

(5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.

How is the County not concerned with the location of industry and use of natural resources?

How is the County not concerned with the incorporation of “operational safeguards” to mitigate

³ Objection of Intervenors Friends of the Columbia Gorge, Inc. and Save Our Scenic Area, p. 3.

1 project impacts? How is the County not concerned with “timely” decisions made without
2 unnecessary delay? How is the County not concerned with environmental protection? Friends
3 and SOSA do not explain. Nor do Friends and SOSA explain why the County would have
4 briefed these issues, if they were not affected by them.⁴ RCW 80.50.010, and EFSEC’s
5 interpretation of it, affect the County. Friends and SOSA fail to show otherwise.

6 **2.2 Skamania County is Located within the United States**

7 Skamania County is located within the United States. The Columbia River Gorge runs
8 through Skamania County. It is not clear how “the uniqueness of the Columbia River Gorge and
9 its importance to the citizens of the entire United States,” would affect all citizens of the United
10 States outside Skamania County, but not those residing within Skamania County.⁵ It is
11 Skamania County citizens who are among the most impacted by the presence of the Gorge, given
12 its location in Skamania County. Consistently, much of Skamania County’s briefing has
13 centered on the Gorge, with likely more pages devoted to that issue than any other.⁶

14 Friends and SOSA may view the County dismissively, as if County interests in the Gorge
15 pale in comparison to the importance of their interests. But, not one of us owns the Gorge. We
16 are here only briefly; the Gorge has been and will be here much longer than any of us. Skamania
17 County appreciates its beauty. It has adopted zoning implementing the National Scenic Area
18 Act, which have been approved by the Gorge Commission, and is responsible for mitigating
19 development occurring within NSA boundaries.⁷ The County is used to ensuring aesthetics
20 impacts are addressed, and plays a significant role in protecting the Gorge. However, Skamania
21 County also has a small percentage of privately owned land outside NSA boundaries - 7%.⁸

22
23 ⁴ See e.g., County’s oral argument; written opening statement; land use briefs; and adjudicative briefs. For example,
24 the County’s response adjudicative brief focuses on environmental protection at section II(C), and on timely
25 decision making at section III; the County’s land use brief addresses resource use in section II(C).

26 ⁵ Objection of Intervenors Friends of the Columbia Gorge, Inc. and Save Our Scenic Area, p. 4.

⁶ See in particular County’s adjudicative opening and response briefs.

⁷ Ex. 51.00R (Testimony of Commissioner Pearce), p. 4:13-22; SCC 22.02.050 (“title applies to all lands in that
portion of Skamania County lying within the Columbia River Gorge National Scenic Area....”)

⁸ Ex. 51.00R (Testimony of Commissioner Pearce), p. 4:4-9 and p. 6:8-13.

1 And, the County believes it is reasonable to allow this one economic development project, with
2 its less than 60-acre permanent footprint,⁹ in this limited area. Others may disagree with the
3 County's position, but there is no county more affected than Skamania by how EFSEC considers
4 the Gorge in relation to this Project.

5 **2.3 Chemawa Hill is Located within Skamania County**

6 Chemawa Hill is located within Skamania County, so how EFSEC addresses Project
7 siting issues on Chemawa Hill affects Skamania County. Friends and SOSA make a blanket
8 assumption that Skamania County has no interest in its past. However, there is no one group
9 who "owns" history, thus excluding all others from being affected by it, understanding it, and
10 incorporating this understanding into decision making. The point of cultural resources analysis
11 is to inform decision makers, so decisions are better informed and made.

12 To preclude a County appointee from accounting for cultural resources issues, is to tell
13 that representative that their analysis may not be informed by cultural resources issues. There
14 are three reasons why this is not consistent with EFSEC review procedures. First, in the
15 County's view, such an approach fails to accord respect to those with the closest blood-ties to the
16 earliest inhabitants of the area. Presumably, those individuals and their representatives prefer
17 these issues be considered when land use decisions are made. Second, from a legal perspective,
18 such an approach is not consistent with EFSEC's approach to the issue, or SEPA, which
19 **requires** decision makers to consider cultural resource impacts.¹⁰ Third, if it were true that the
20 County was not affected by cultural resource issues and its appointee should ignore them, then
21 Friends and SOSA would also lack any interest in cultural resources, and therefore lack standing
22 to make the objection in the first place.

23 Friends and SOSA present no legal or factual basis for their objection. Skamania County
24 requests it be denied.

25 ⁹ FEIS Table 2-1.

26 ¹⁰ WAC 197-11-444.

1 **3. ARGUMENT: RESPONSE TO PETITIONS FOR RECONSIDERATION**

2 **3.1 Skamania County Certified Land Use Consistency**

3 Skamania County issued a Certificate of Land Use Consistency through Skamania
4 County Resolution 2009-54. The Resolution is titled, "**Certification of Land Use Consistency**
5 **Review for the amended application for the Whistling Ridge Energy Project. ...**"¹¹ The
6 Resolution states:

7 NOW THEREFORE, BE IT RESOLVED, the Board of County Commissioners, after
8 due deliberation, adopts the Certificate of Land Use Consistency as a staff report to
9 EFSEC, not a decision, and resolves that the **Whistling Ridge Energy Project is**
10 **consistent with the Skamania County land use plans and applicable zoning**
11 **ordinances.**¹²

12 Skamania County has explained that this was its certificate of land use consistency.¹³
13 Friends' attaches a two-sentence long, superior court order from outside the Record. The two
14 sentences refer to an "opinion letter" as being a "final decision." EFSEC does not decide
15 whether or not the certificate is a "decision" under the Land Use Petition Act, but whether the
16 County certified land use consistency. And, it did. The County adopted the certificate by
17 Resolution. The Resolution includes the staff report and is identified as being a certificate of
18 consistency. The document is in the Record.¹⁴ An unnecessary amount of briefing has focused
19 on this.

20 **3.2 EFSEC Correctly Interpreted the Hearing Examiner Decision**

21 EFSEC's Recommendation reflects an understanding of the Examiner's Decision. As an
22 unpublished administrative opinion, a county hearing examiner decision on SEPA has no binding
23 authority on EFSEC. However, EFSEC reviewed the decision, which is in the record, and

24 ¹¹ Ex. 2.03 (Resolution 2009-54), emphasis in text, p. 1.

25 ¹² Ex. 2.03 (Resolution 2009-54), emphasis in text, p. 2.

26 ¹³ Skamania County and Klickitat County Public Economic Development Authority's Land Use Response Brief,
pgs. 2-3.

¹⁴ Ex. 2.03 (Resolution 2009-54),

1 understood it. The hearing examiner decision did not address the Project, but a large-scale
2 rezone effort to implement the County comprehensive plan. SOSA acknowledges this:

3 **The Commissioners thus concluded that: "Skamania County is in the process of**
4 **updating zoning classifications for all land within unincorporated Skamania County**
5 **to be consistent with the adopted Comprehensive Plan or adopted subareas**
6 **plans...."**¹⁵

7 Despite this concession by SOSA, Friends devotes three pages of briefing to a single sentence in
8 EFSEC's Recommendation. However, EFSEC is correct, the Hearing Examiner did reject the
9 County's land use planning attempt. The basis for that rejection was SEPA.

10 **3.3 County Zoning Authorizes the Project**

11 EFSEC properly found the Project, excepting a small portion permitted by conditional
12 use, is authorized by local zoning. The zoning code states, "[i]n the areas classified as
13 **Unmapped (UNM) all uses which have not been declared a nuisance by statute, resolution,**
14 **or court of jurisdiction are allowable."**¹⁶ As EFSEC acknowledged, the Project has not been
15 declared a "nuisance," so is a permissible use. SOSA effectively concedes this point: "The
16 Skamania County Commissioners were rightly concerned that these areas were ripe for
17 development without zoning."¹⁷ For the 127 acres located in Resource Production Zone
18 FOR/AG 20, a conditional use permit is required.¹⁸ Skamania County authorizes conditional
19 uses for a variety of uses in this zone, including sawmills, shake and shingle mills, geothermal
20 energy facilities, aircraft landing fields, and semi-public facilities and utilities.¹⁹ The Project
21 comes within the scope of this list of uses. This issue has already been briefed.

22 Friends does not like these facts. So, it asks EFSEC to set aside these local laws based on
23 their "dangerous precedential nature" and the fact that more energy development might be

24 ¹⁵ Petition of Save Our Scenic Area, p. 22.

25 ¹⁶ Skamania County Code 21.64.020, emphasis added.

26 ¹⁷ Petition of Save Our Scenic Area, p. 22.

¹⁸ Ex. 2.03 (Certificate of Land Use Consistency), p. 11; see Skamania County Code, 21.56.030.

¹⁹ SCC 21.56.030.

1 proposed in the "Unmapped lands (*i.e.* most of the County) without any planning review."²⁰
2 Friends does not correctly represent how land use planning occurs either in Washington State
3 generally, or in Skamania County, specifically. Any energy project potentially reviewed in
4 Skamania County, must, at minimum:

- 5 • Undergo SEPA review, and is subject to SEPA conditions imposed on the Project;²¹
- 6 • Is reviewed under the County's critical areas ordinance;²²
- 7 • Must obtain building permits;²³ and
- 8 • Various other local, state, and federal requirements, as summarized at Table 4.1 of the
9 Final EIS.

10 Other applicable laws and agency consultation requirements are described more generally in the
11 Final EIS, at Section Four. Thus, simply because the Project is classified as "unmapped," does
12 not mean there is no review; quite the contrary. If there were no review, and approval were as
13 simple as Friends asserts, the County would not have referred the applicant to EFSEC. However,
14 the Project is authorized, and EFSEC understood this.

15 Scenic Area boundaries and government ownership further restrict development within
16 the County. Friends continues to misunderstand this fact. Energy projects could not be sited
17 through "most" of the County, because most of the County is either held by government, which
18 limits development potential, or within the Scenic Area. That leaves 7%.²⁴ **Not seventy; seven.**

19 EFSEC reviews proposed projects. It does not determine whether adopted zoning and
20 planning policies were wisely made or require revision. Friends suggests that EFSEC review
21 should hinge its Recommendation on how the County might review projects in future. But, this
22 is not EFSEC's role. EFSEC reviews individual projects; assesses land use consistency; and Ch.
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24 ²⁰ Friends of the Columbia Gorge's Petition for Reconsideration, pgs. 8-9.

25 ²¹ SCC Title 16 (SEPA Regulations), *see also* Ch. 43.21C RCW.

26 ²² SCC Title 21A (Critical Areas Regulations), *see also* RCW 36.70A.170 and .172.

²³ SCC Title 15 (Building and Construction Titles), *see also* Ch. 19.27 RCW.

²⁴ Ex. 51.00R (Testimony of Commissioner Pearce), p. 4:4-9 and p. 6:8-13.

1 80.50 RCW provides for preemption. EFSEC does not adopt local land use plans and
2 regulations.

3 **3.4 Comprehensive Plan Consistency is not Required**

4 EFSEC properly determined the Project was “consistent and in compliance with city,
5 county, or regional land use plans or zoning ordinances.”²⁵ In Washington, applicable zoning
6 governs the uses which are permitted. If a comprehensive plan is inconsistent with the zoning,
7 the zoning governs. This is well established case law, which did not change with GMA’s
8 enactment in 1992. SOSA’s position that plans govern development is the opposite of what the
9 appellate courts have held in post-1992 decisions. In the event of conflict, the zoning code
10 governs.²⁶

11 Consistent with EFSEC’s Recommendation, the County comprehensive plan
12 acknowledges “[i]t does not provide all the details”²⁷ and “is not a regulatory document.”²⁸ It is
13 simply a “guiding document.”²⁹ There is a 2007 Plan provision addressing consistency between
14 County-issued development permits and the plan, which is different from the language in the
15 1977 Plan. However, Skamania County did not have a zoning code in 1977, so the older Plan
16 required inconsistent uses to be subject to “strict review.” The County did not adopt its first
17 zoning code until 1989 and 1991. This is partly because the County is 85% National Forest, so
18 there was less need to do so.³⁰ However, at present, there are code provisions that govern
19 development, and those code provisions authorize the use unless it is a nuisance and do not
20 require plan consistency.
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24 ²⁵ RCW 80.50.090(2).

25 ²⁶ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997).

26 ²⁷ Skamania County Comprehensive Plan, pg. 22.

27 ²⁸ Skamania County Comprehensive Plan, pg. 6.

28 ²⁹ Skamania County Comprehensive Plan, pg. 6.

29 ³⁰ See Comprehensive Plan, p. 9; Ex. 51.00R (Commissioner Pearce testimony), p. 6.

1 Even if Washington case law or the County Code required plan consistency, the Project is
2 consistent. The Plan designates the site primarily as Conservancy,³¹ and contemplates “[l]ogging,
3 timber management, agricultural and mineral extraction” as the “main use activities.”³²
4 Appropriate uses include “[p]ublic facilities and utilities, such as parks, public water access,
5 libraries, schools, utility substations, and telecommunication facilities,” along with “logging and
6 mining camps” and “surface mining” via conditional use permit.³³ Wind development is no
7 more intensive than some of these uses, and is a resource-based use, compatible with maintaining
8 existing, resource based forestry uses.³⁴

9 SOSA’s position that a use cannot be resource based unless it is a “GMA designated
10 resource” reflects a fundamental misunderstanding of the Growth Management Act, Ch. 36.70A
11 RCW. GMA requires designation of certain natural resource lands, which it defines as including
12 agricultural, forest, and mineral resource lands.³⁵ But, GMA in no way precludes jurisdictions
13 from having other natural resource based uses; it just does not afford special protections for
14 them. The Project supports existing uses, and is consistent with the uses the plan identifies.

15 **3.5 Moratorium Does not Apply**

16 The County adopted a moratorium to allow for further planning to occur within the
17 unmapped areas. As already briefed, the moratorium does not apply to the Project or to
18 EFSEC.³⁶ It does apply to County processing of SEPA checklists for forest conversions. But,
19 there was no SEPA Checklist processed for Whistling Ridge because an EIS was prepared, and
20 the County is not the SEPA lead official. In any event, the County could not apply a moratorium
21 to an EFSEC permitting process.

22
23 ³¹ Ex. 2.03 (Certificate of Land Use Consistency), pg. 5 (Comprehensive Plan designates the alternative location for
24 the operation and maintenance building as Rural Lands II). See Comprehensive Plan, pgs. 25-26.

³² Skamania County Comprehensive Plan, pg. 25.

³³ Skamania County Comprehensive Plan, pg. 26.

25 ³⁴ The 1977 Comprehensive Plan is no long in effect, and applied to only a limited portion of the County.

26 ³⁵ RCW 36.70A.170.

³⁶ See e.g., Skamania County’s land use response brief, section II(E).

1 **3.6 The County Opposes Further Oral Argument**

2 EFSEC commenced the formal, adjudicative hearing in January of this year. The hearing
3 continued for a week and a half. The question of consistency and preemption was addressed.³⁷
4 Opponents fail to cite to any provision in EFSEC's rules which requires anything more. There
5 is no legal requirement for further hearings. After almost three years of review, it is time for the
6 review process to conclude.

7 **3.7 Extra-Record Documents Should be Stricken**

8 Friends and SOSA include documents from outside the Record, including:

- 9 • Cowlitz County Superior Court Decision;
10 • Ordinance 2011-03 and Agenda Item Commentary;³⁸
11 • Material related to wind project in Wyoming;
12 • Scenic Area book excerpt;
13 • Previously rejected Ex. 23.02;
14 • Wildlife information;³⁹ and
15 • Hearing Examiner briefing.⁴⁰

16 Friends and SOSA do not introduce these documents by motion, instead attaching and citing to
17 the documents as if they were within the Record. Reconsideration petitions may not rely on
18 documents from outside the Record.⁴¹ Skamania County requests the documents be stricken.

19 **3.8 Seattle Audubon Petition is without Basis**

20 The Project has been exhaustively studied and fully mitigated for wildlife impacts. The
21 Seattle Audubon Society does not present any basis for reconsideration, as the Applicant's
22 response addresses in detail. The County requests this petition be rejected.
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24 ³⁷ See land use briefs submitted by the parties.

25 ³⁸ The County does not oppose consideration of the Ordinance itself.

26 ³⁹ See Friend's reconsideration petition, footnotes 67, 69, and 70.

⁴⁰ The referenced excerpts on p. 6:5-8, of Friend's reconsideration petition support EFSEC's, the Applicant's, and
County's position that the use is authorized outright, so the inclusion of the excerpt is not clear.

⁴¹ WAC 463-30-335(2).

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3 **4. CONCLUSION**

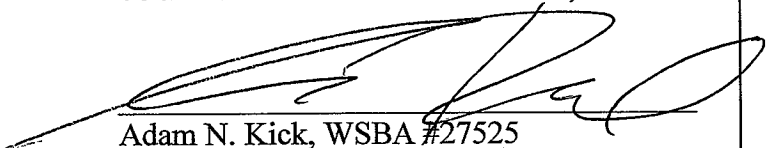
4 Skamania County requests Project approval as proposed. The Friends, SOSA, and
5 Seattle Audubon reconsideration petitions lack legal or factual foundation supporting revisions to
6 the Recommendation. And the Friends/SOSA joint objection is similarly without any basis. Of
7 particular concern to the County, is the decision by Friends and SOSA to include documents
8 from outside the Record in their reconsideration petitions, which is not permitted under EFSEC
9 rules.

10 EFSEC has thoroughly reviewed this Project. County zoning authorizes it and it should
11 be approved as proposed.
12

13 DATED this 14th day of November, 2011.

14 ADAM NATHANIEL KICK
15 Prosecuting Attorney for Skamania County

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